Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1992

GEORGE WADE and JOYCE WADE,

Petitioners,

v.

EDWARD B. HOPPER, II, et al.,

Respondents,

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

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QUESTION PRESENTED

This appeal address a question of exceptional importance as to whether every individual can claim the protections of the laws in the federal courts.

LIST OF PARTIES

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OPINIONS BELOW

The final opinion of the Seventh Circuit decided on February 17, 1993, and published on May 20, 1993, is reproduced in the appendix. App. 1-12.

The Wades made a suggestion for rehearing en banc to the final opinion, which was denied by order dated April 22, 1993, and is reproduced. App. 13-15.

The final opinion of the district court dated May 30, 1991, is reproduced. App. 16-51.

JURISDICTION

The Wades claim that the suggestion for rehearing en banc tolled the time within which to file this Petition. The final opinion of the Seventh Circuit was entered on February 17, 1993. The Seventh Circuit denied the Wades' petition for rehearing by Order dated May 22, 1993. The grounds on which the jurisdiction of this Court is invoked is 28 U.S.C. §1254(1) which

confers jurisdiction on this Court by the filing of this Petition.

RULES INVOLVED

The rules involved, are:

The First Amendment-

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourth Amendment-

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly

describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment-

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in a criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

Title 28 U.S.C. §453-

"Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God.'"

Title 11 U.S.C. §704(7)-

"The trustee shall-

(7) unless the court orders otherwise, furnish such information concerning the

estate and the estate's administration as is requested by a party in interest."

Rule 6002(a) of the Bankruptcy Rules-

"(a) Accounting Required. A custodian required by the Code to deliver property in the custodian's possession or control to the trustee shall promptly file a report and account with the court with respect to the property of the estate and the administration thereof."

STATEMENT OF CASE

The Wades filed a joint bankruptcy petition as husband and wife in the U.S. Bankruptcy Court for the Southern District of Indiana on December 30, 1985. The Wades simultaneously filed a bankruptcy petition for the U.G. Wade Trucking, Inc., (referred to as the "company").

The company bankruptcy petition listed

twenty (20) items of property at Schedule B-1 consisting of 20 accounts receivable totalling $85,440.56 (referred to as "company accounts" or "items of property"). Edward B. Hopper, II, ("Hopper"), was the appointed trustee in both bankruptcy cases and served in that capacity until November, 1987, when he resigned on the motion of the Wades to remove him as trustee.

In 1986, Hopper redirected the personal mail of the Wades without any notice and withheld this mail from the Wades. In the redirected mail Hopper received a $206.00 automobile insurance premium refund and notice of insurance cancellation on the Wades. Hopper negotiated the premium refund and withheld the notice the Wades' insurance was cancelled. Hopper also seized a bank account that contained petitioner George Wade's veterans disability benefits. Hopper also directed

a search of the Wades' home without warrant or authorization by the bankruptcy court. Hopper in addition filed a complaint against the Wades for concealment of assets and documents. The complaint against the Wades was based on the voluntary testimony of individuals given to Hopper's attorneys (hereafter referred to as "Hopper's witnesses"). Hopper's witnesses testified that George Wade had $200,000.00 cash in his pocket and $40,000.00 of antique furniture, when these individuals testified that they did not collect any company accounts.

Before Hopper's witnesses testified, Hopper and his counsel in the bankruptcy cases had received evidence from company account debtors such as copies of checks and other documents showing that Hopper's witnesses had in fact collected substantial company accounts, before and after the bankruptcy petitions were filed.

On January 20, 1988, the Wades commenced this action with a three-count complaint filed in the U.S. District Court for the Southern District of Indiana. In the complaint, the Wades alleged: (1) a Racketeering Influenced Corrupt Organization Act ("RICO") action against Hopper and others surrounding the collection and concealment of the company accounts; (2) constitutional torts against Hopper; and (3) attorney malpractice against attorneys employed by Hopper in the bankruptcy cases. On May 15, 1988, the district court entered protective orders prohibiting the oral deposition of Hopper and others.

In September, 1988, Hopper filed a final report in the bankruptcy that accounted for by name three of the twenty company accounts listed on Schedule B-1. Hopper's final report did not account for by name the other seventeen company

accounts listed on Schedule B-1. The remaining seventeen company accounts have not been addressed by Hopper, or any court or tribunal, in the record of the bankruptcy cases. Since January, 1988, the Wades have filed eleven appeals and petitions for writs of assistance to the Seventh Circuit in the bankruptcy cases, in each case attaching a copy of the Schedule B-1 to the appeal or petition with a request for relief that Hopper and Hopper's witnesses shall account for this property. See, Related Cases, App. 52.

Since June, 1988, in this matter, Hopper and his attorneys, and Hopper's witnesses have all asserted an attorney-client privilege surrounds their information concerning the collection of the company accounts listed on Schedule B-1. No court or tribunal has made a statement in writing as to the applicability of the attorney-client privilege to this type of information. Id.

In December, 1988, the Wades discovered copies of checks where the attorney for Hopper's witnesses, Robert L. Sheaffer ("Sheaffer"), had collected a company account receivable listed on Schedule B-1 as "H&P Leasing." This was one of the seventeen company accounts Hopper did not mention in his final report, supra. The Wades moved to add Sheaffer as a defendant in the action attaching a copy of the checks where Sheaffer had reduced the company account owed by H&P Leasing to money. Nine days later, the district court stayed this proceeding and all discovery. This stay remained in effect until the final orders of the district court on May 30, 1991. App. 20.

The Wades have consistently alleged that Hopper's witnesses and their attorney, Sheaffer, have no right, title or interest to the collection of the company accounts, and that as a

custodians of estate property, that Hopper's witnesses and Sheaffer have the duty to account for that estate property. There has been no statement in writing by any party, trustee, court or tribunal concerning the missing company accounts listed on Schedule B-1, or what right, title or interest Hopper's witnesses or Sheaffer had in the company account listed as "H&P Leasing" on Schedule B-1. Id.

In 1988, Hopper represented Sheaffer as counsel for the debtor in Sheaffer's own bankruptcy case. In June, 1989, the Wades discovered a letter that Hopper's counsel sent to the company account debtor listed as "Hartwick" on Schedule B-1, and Hartwick's response including copies of checks made payable to "Wade Trucking" and Sheaffer dated after the bankruptcy case filing. The checks were executed by "Wade Trucking" and "Robert L. Sheaffer" but not by Hopper or the Wades. Hopper and other

defendants moved to dismiss the Wades' complaint on grounds the complaint lacked particularity and predicate acts of fraud and concealment of company accounts, since the Wades could not plead where the company accounts listed on Schedule B-1 went. The Wades moved for leave to amend their complaint to allege the fraudulent collections of Hartwick and H&P Leasing by Sheaffer with full particulars pleading the check numbers, dates and amounts in response to motions to dismiss.

Throughout all complaints the Wades articulated a RICO injury personal to them that the Wades were deprived of a fresh start after the bankruptcy and that the Wades are being assessed taxes on income realized by others in the RICO enterprise. The Wades are being assessed taxes as the principal officers of the company for tax year 1985. The company accounts listed on Schedule B-1 were paid by the account

debtors who reported these payments on "Form 1099" to the Internal Revenue Service ("I.R.S."). The I.R.S. has recently attached the Wades' bank account and payroll check to collect the taxes on income received by others from the company accounts. The collections of the company accounts should have went to the bankruptcy estate, which in turn should have been distributed to the I.R.S. to pay the company's taxes for the year 1985. This would have been the normal operation of the Bankruptcy Code, since federal taxes by the government are priority claims under 11 U.S.C. §507.

The lower courts have determined that the Wades have suffered no injury as a result of the RICO activity. App. 6-8 and App. 38-44.

The Seventh Circuit has determined that the Wades' discovery arguments that the bankruptcy trustees and custodians of

estate property are required by law to account for items of property listed in the Wades' schedules are entirely without merit. App. 12.

The lower courts have determined that the Wades have no constitutional tort claims against Hopper for: (1) the appropriation and withholding of the Wades personal mail by Hopper without notice to the Wades; (2) for the appropriation of their automobile insurance premium refund and failure to tell the Wades their insurance was cancelled; (3) for the appropriation of George Wade's bank accounts containing post-petition veterans disability benefits; and (4) the malicious filing of the complaint against the Wades by Hopper to deny the Wades' discharge of debts in bankruptcy when Hopper knew full well that the testimony of Hopper's witnesses was suborned perjury, so Hopper could conceal the collection of the company accounts. App. 9-11.

The district court properly concluded that the unreasonable search of the Wade home was a viable claim. App. 37. The Wades had filed an adversary complaint in the bankruptcy court against auctioneer and appraiser Jack Fife and his wife, who searched the Wade home on Hopper's instructions. The Wades advised the bankruptcy court of this pending viable claim against Hopper in this proceeding, and it requested for relief that the bankruptcy court report to the district court in this proceeding that there was no warrant, order, or authorization of employment by the bankruptcy court in the record before the unreasonable search of the Wade home. After the withdrawl of the Wade bankruptcy to the district court and the determination that the Wades had a viable claim against Hopper for the unreasonable search in this matter, the Wades moved to dismiss the adversary

complaint. The district court dismissed the adversary complaint on Hopper's motion for summary judgment. The district court ruled that the viable claim against Hopper on the search of the Wade home was disposed of by summary judgment in the adversary complaint, and the doctrine of res judicata applies. App. 9-11.

As for the attorney malpractice claims against Hopper's attorneys in the bankruptcy the Seventh Circuit has ruled that the willful and malicious filing of the complaint against the Wades to deny their discharge in bankruptcy on suborned perjury to conceal collection of company accounts is not "fraud, collusion, or malicious conduct" by attorneys. App. 12.

SUBSTANTIAL DEPARTURE FROM THE LAWS OF THE UNITED STATES

The Wades have been deprived of the right of every individual citizen to claim the protection of the law. In Marbury v.

Madison, 1 Cranch 137, 2 L.Ed. 60 (1803), the Supreme Court decided:

"The very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. [The] government of the United States has been emphatically termed a governments of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."

As citizens of the United States, the Wades have a vested right to petition the government for redress of grievances vested by the First Amendment to the Constitution of the United States. The Wades have a vested right to be secure in their persons, houses, papers and effects, vested by the Fourth Amendment to the Constitution of the United States. The Wades have a vested right to due process of law vested by the Fifth Amendment to the Constitution of the United States. Marbury v. Madison provides in pertinent part:

"[I]t is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature." "This oath certainly applies, in an especial manner, to their conduct in their official character."

"It is in these words: 'I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as _____, according to the best of my abilities and understanding, agreeably to the constitution, and the laws of the United States.'"

Marbury v. Madison established that it is the first duty of the government by the courts to afford every individual the protection of the laws. Marbury v. Madison established that judges have a duty to inspect the Constitution of the United States. The First and Fourth and Fifth Amendment to the Constitution of the United States are reproduced in this petition at pages 2-3 for inspection.

It is the duty of each and every judge to read what they have sworn to support, and to read the petitions for assistance before the court, to make certain that what is placed within the jurisdiction of the court is agreeable with the Constitution of the United States. Id.

The Wades have filed 11 appeals and writs for assistance to the Seventh Circuit in the Wade bankruptcy invariably attaching Schedule B-1 as Exhibit "A" and requesting that bankruptcy trustee Hopper account for the items of property listed on Schedule B-1. App. 52. There is no statement of any court or tribunal as to the duties of trustees and custodians to account for Schedule B-1. The sole statement we have for the record is the statement of successor bankruptcy trustee Neil E. Shook ("Shook"), who was appointed after Hopper's removal in the Wade bankruptcy, that he sees absolutely no reason why Sheaffer should account for the proceeds of the company account receivable listed as Hartwick on Schedule B-1. One good reason is that the law provides that custodians of bankruptcy estate property shall account for that property. Rule 6002 of the Bankruptcy Rules. Another

good reason is that this money should have gone to the United States Treasury via the I.R.S. as a priority creditor in the Wade bankruptcy since Sheaffer had no right, title or interest to the property founded in the laws.

The Seventh Circuit has now determined that the Wades' discovery arguments that bankruptcy trustees and custodians of estate property are required by law to account for items of property listed on the debtor's schedules, are "entirely without merit." App. 12.

11 U.S.C. §704 provides that trustees shall be accountable, provide information concerning the administration of the estate, and file a final report. In Re Grand Jury Proceedings and In Re Jim's Garage, Inc., Bankruptcy Reporter 945 (E.D.MIch.-1980) (hereafter cited as "Jim's Garage, Inc."). Jim's Garage, Inc., is a case in point concerning the duty of

a former Chapter 7 trustee to file a final report which details the disposition of items of property listed on a debtor's schedules. 119 B.R. 952-953.

In the case of Jim's Garage, Inc., the district court dealt with the "privileges" asserted by a Chapter 7 trustee to withhold documents concerning his administration of the estate and documents that accounted for property of the bankruptcy estate. The district court ruled that the requested documents are "public records" wherever located. 119 B.R. 948-950. The district court noted that the Chapter 7 trustee asserted that records relating to his administration of the estate were "private" without any legal support or precedent. 119 B.R. 950.

In this case, Hopper asserts his trustee's records concerning the company accounts listed on Schedule B-1 are "privileged" without any legal support or

precedent. That is because there is none. Jim's Garage, Inc., supra. There has been no statement in writing by any lower court addressing the validity of Hopper's "privilege". Likewise, Hopper's attorneys in the bankruptcy assert that documents concerning the collections of company accounts listed on Schedule B-1 are protected by the attorney-client privilege because Hopper turned the documents over to them. Thus, Hopper asserts a "privilege" and evades the production of the documents delivering the documents to his attorneys, who now assert the attorney-client privilege. The issue of the validity of this attorney-client privilege was placed before the district court in this case in June, 1988, and it has routinely been brought before the district court since then at hearings upon subpoenas issued for information concerning the collection of company

accounts listed on Schedule B-1 and what right, title or interest Sheaffer had in the company account listed as Hartwick on Schedule B-1. However, no court or tribunal has rendered a statement in writing concerning the validity of the attorney-client privilege or Hopper's "privilege" over the documents of Hopper's administration concerning the company accounts listed on Schedule B-1. See, Related Cases, App. 52. The district court on the case of Jim's Garage, Inc. noted that if a Chapter 7 trustee were allowed a privilege, "bankruptcy trustees would henceforth be licensed not only to abscond with assets of the bankrupt estate entrusted to their case, but also with any records and evidence of their misconduct." 119 B.R. 955. Such is the case here.

In Pepper v. Litton, 308 U.S. 295, 306-307, 60 S.Ct. 283, 84 L.Ed. 281 (1940), when a fiduciary's dealings are

challenged, his dealings are subjected to rigorous scrutiny. 308 U.S. 306. A fiduciary cannot violate the rules of fair play to conceal information required by law to be revealed, and utilize his unique access to information to his own preferment. 308 U.S. 310. The Wades have challenged trustee Hopper's dealings. No lower court or tribunal has required Hopper to account for the items of property listed on Schedule B-1. The statement by the Seventh Circuit in the final opinion that the Wades' discovery arguments that bankruptcy trustees and custodians of estate property are required by law to account, is "entirely without merit" [App. 12] is contrary to Pepper v. Litton, supra. The Wades are deprived of the opportunity to plead a legally sufficient complaint because the Wades are deprived of the information required by law to be revealed. 11 U.S.C. §704.

The Seventh Circuit has ruled that the conduct of Hopper's attorneys in willful and malicious prosecution of a false complaint with the knowledge that it was based on suborned perjury by Hopper's witnesses who denied collecting company accounts listed on Schedule B-1, when these attorneys had in their "privileged" files, evidence that these witnesses did in fact did collect substantial company accounts listed on Schedule B-1, is not "fraud, collusion, or malicious conduct" by Hopper's attorneys. App. 12. This determination by the Seventh Circuit is government by men, not government by law, which is contrary to Marbury v. Madison, supra. The Wades have been deprived of the right of every individual to claim the protection of the law when he receives an injury. Id. Being maliciously prosecuted on a false complaint by attorneys in the federal courts for crimes the individual

did not commit is an injury to that individual.

The Seventh Circuit has determined that being deprived of an expeditious bankruptcy and a fresh start is no injury to the Wades. App. 6-7. The Seventh Circuit is ruling that being deprived of vested legal rights is no injury to the Wades, contrary to Marbury v. Madison, supra.

The district court determined that the Wades being assessed taxes on income they did not receive is no RICO injury to the Wades. App. 43. The district court determined that the Wades being assessed taxes on income they did not receive is no Bivens injury to the Wades. App. 30-32. The Seventh Circuit affirmed the district court. App. 12. This is government by men, contrary to Marbury v. Madison, supra., who think it is all right for debtors to be saddled with taxes because

bankruptcy trustees and attorneys to steal money that should go to the largesse of the United States Treasury The Wades are deprived of a vested legal right not to be assessed taxes on income received by others and taxes that should have been paid in the reduction of estate assets to money. Id.

REASONS WHY THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

The United States General Accounting Office has recently published a Report to the Chairman, Subcommittee on Economic and Commercial Law, Committee on the Judiciary of the House of Representatives of the U.S. Congress, "Bankruptcy Trustees. Oversight Improved, But Extent Of Trustee Fraud Is Unknown." GAO/Gdd-93-54, U.S. General Accounting Office, Washington, D.C., January 1993. At page ten, the report cites challenges facing the system including "insufficient authority to hold

trustees accountable for departures from fiduciary responsibilities." Bankruptcy fraud by bankruptcy trustees amounts to millions of dollars that should go to the government. Id. If the Supreme Court were to enforce the fiduciary duties of bankruptcy trustees to account for property here, this precedent would result in millions of dollars to the government. Id. The extent of bankruptcy fraud may be unknown, but we have a start with items of property listed on Schedule B-1.

The Justices of the Supreme Court have taken an Oath of Office to administer justice to the poor and the rich alike. 28 U.S.C. §453, supra. The Wades like millions of other similarly situated Chapter 7 bankruptcy debtors are poor. Failure to grant this petition for writ of certiorari would be a breach of duty by the Justices of the Supreme Court to provide protection of the laws to every

individual who suffers injury. This is the first duty of government. Marbury v. Madison, supra.

The substantial departures from the laws of the United States in this matter are of the type that shock the conscience and undermine the public confidence in the federal judiciary to administer the laws of the United States and furnish every individual a remedy when deprived of vested legal rights.

PRECISE RELIEF REQUESTED

For the foregoing reasons, the Wades request that this petition for writ of certiorari be granted and that writ of certiorari be issued to the United States Court of Appeals for the Seventh Circuit to ascertain the following questions.

(1) What privilege attaches to Hopper's trustee records concerning collections of the company accounts listed on Schedule B-1, and the authority for this privilege

in the laws of the United States. (2) What determinations have been made in writing as to the attorney-client privilege asserted by Hopper's attorneys over information concerning collections of the company accounts listed on Schedule B-1, and authority for this privilege. (3) Why are the collections of the company accounts listed on Schedule B-1 not a matter of public record for inspection by members of the public and authority for the withholding of this information from the public record. (4) Authority why the Wades should not be availed an opportunity to amend their complaint upon being provided information concerning who collected the company accounts listed on Schedule B-1 and the recipient's right to keep this money. (5) Authority that the willful and malicious prosecution of false complaints by attorneys is not the type of conduct that arises to the level of mere

negligence. (6) Authority that the deprivation of a vested legal right of the Wades as individuals to an expeditious bankruptcy and fresh start does not constitute an injury to the Wades. (7) Authority that the Wades as individuals being assessed taxes on income realized by others constitutes no injury to the Wades. (8) Authority that the Wades as individuals having to pay taxes that should have been paid from proceeds of estate property in the normal operation of the U.S. Bankruptcy Code does not constitute injury to the Wades, and such other and further relief as proper in the premises.

CONCLUSION

The petition for writ of certiorari should be granted.

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In the

United States Court of Appeals

For the Seventh Circuit

No. 91-3892

GEORGE WADE and JOYCE WADE,

Plaintiffs-Appellants,

v.

EDWARD B. HOPPER, II, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 88 C 65—**Larry J. McKinney**, *Judge.*

ARGUED NOVEMBER 5, 1992—DECIDED FEBRUARY 17, 1993*
OPINION PUBLISHED MAY 20, 1993

Before RIPPLE and KANNE, *Circuit Judges*, and WILLIAMS, *District Judge.***

PER CURIAM. This appeal reaches us after extensive litigation in both the bankruptcy and district courts. The Wades brought suit against several parties to redress alleged wrongs suffered by them as a result of their corporation's voluntary bankruptcy petition. The Wades are the principal owners and officers of Wade Trucking, Inc. The defendants include former bankruptcy trustee (Edward

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* This case was originally decided by unpublished order under Circuit Rule 53. The court, upon request, issues this decision as an opinion.

** The Honorable Ann Claire Williams, District Judge for the Northern District of Illinois, is sitting by designation.

Hopper II), attorneys hired by Hopper as bankruptcy trustee (Hopper & Opperman and Hostetler & Kowalik), and Wade Trucking's primary secured creditor (Merchants Bank and Trust). The plaintiffs' primary complaint is that the defendants looted Wade Trucking's bankruptcy estate, injuring the Wades. The remainder of the plaintiffs' complaints all stem from the bankruptcy proceedings.

A review of the procedural history of this case is relevant. On January 20, 1988, the plaintiffs filed a three-count complaint. After defendants moved to dismiss, the district court permitted the Wades to file an amended complaint on May 5, 1988. On September 1, 1988, the plaintiffs were permitted to join Merchants Bank as a defendant. On September 6, 1988, the plaintiffs filed a second amended complaint. Count One asserts various constitutional tort claims against Edward Hopper II and Gordon Smith pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S. Ct. 1999 (1971). Count Two asserts a RICO claim against Hopper, Smith and Merchants. Count Three asserts attorney malpractice claims against all current defendants except Hopper and Merchants.[1]

Prior to December 6, 1988, all defendants save one had filed and briefed motions to dismiss.[2] On December 6, plaintiffs again sought leave to amend their complaint, as well as to join Wade Trucking as a plaintiff, and Charles Kilby and Timothy J. Woods as defendants. Before the district court could rule, the plaintiffs sought to amend their complaint yet again on December 13. The district court stayed proceedings on December 16, 1988, and later modified the stay on January 10, 1989. On October 12, 1989, the plaintiffs filed another motion for leave to amend, claiming new evidence supported their RICO claim. Not surprisingly, the defendants objected. The district court per-

[1] The plaintiffs' claims against Gordon Smith are not at issue in this appeal.

[2] The last defendant filed its motion to dismiss on December 12, 1988.

mitted the plaintiffs to file a proposed amended complaint and instructed the defendants to file their objections.

On May 30, 1991, the district court denied plaintiffs' motion for leave to amend and held that the second amended complaint governed the case. The court also denied plaintiffs' motion for joinder. Finally, the court dismissed all but one of the plaintiffs' claims for failure to state a claim for which relief can be granted pursuant to FED. R. CIV. P. 12(b)(6). As for the remaining claim, the court granted summary judgment for defendant Hopper. Plaintiffs filed a timely appeal which challenges virtually every ruling made by the district court. We address each challenge in turn.[3]

Leave to Amend/Joinder

Plaintiffs strenuously argue that the district court erred in refusing to permit them to file their proposed complaint. "[G]ranting or denying a motion for leave is a matter purely within the sound discretion of the district court." *J.D. Marshall International v. Redstart, Inc.*, 935 F.2d 815, 819 (7th Cir. 1991) (citation omitted). We will only reverse the trial court's decision if it denied leave to amend without any justification. *Id.* The district court had more than ample reason for denying plaintiffs' leave to amend.

The district court clearly enumerated its reasons for the denial. First, the proposed complaint failed to comply with FED. R. CIV. P. 8(a), which requires a short and plain statement of the claim. The district court concluded that the fifty-two page rambling and confusing complaint "embodie[d] virtually every conceivable element of poor pleading" and thus was subject to dismissal. After reviewing the proposed complaint, we agree that the complaint did not constitute a short and plain statement.

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[3] Appellee Hopper's motion to strike Appellants' Addendum and all references thereto contained in the Reply Brief is denied.

Plaintiffs argue that RICO claims are complicated and thus likely to be more lengthy. We agree with the plaintiffs' assertion; however, the complaint's length is not its main problem. The problem is its failure to *plainly* state a claim.

> RICO is a complex statute, it is true. Thus, by necessity, most RICO complaints will be somewhat complex. The necessity for complexity, however, does not give litigants license to plead by means of obfuscation. *See* FED. R. CIV. P. 8(e)(1). A RICO complaint must be presented with intelligibility sufficient "for a court or opposing party to understand whether a valid claim is alleged and if so what it is." . . . For its complete failure to adduce an intelligent story, one that a court can follow without untoward effort, we are tempted to dismiss [the complaint].

Jennings v. Embry, 910 F.2d 1434, 1435-36 (7th Cir. 1990) (citation omitted).

Although we are also tempted, we need not affirm the district court's denial of leave to amend solely on the basis of Rule 8(a). According to the Supreme Court, leave to amend is properly denied for the following reasons:

> undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.

Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962).

In particular, the district court noted that the plaintiffs had been granted leave to amend twice before, despite the fact that the defendants had fully briefed their motions to dismiss. We agree that the defendants would have been prejudiced if the plaintiffs were permitted to amend again. Moreover, after reading the proposed complaint, we also agree with the district court's conclusion that the new complaint would be futile since the plaintiffs failed to cure

the defects repeatedly found in earlier complaints. Because the district court relied on solid reasoning in denying plaintiffs' leave to amend, we hold that the district court did not abuse its discretion and properly concluded that the plaintiffs' second amended complaint governed this suit.[4]

Plaintiffs also argue that the district court erred in denying their motion to join Wade Trucking as a plaintiff. This circuit has not formally adopted a standard of review for a FED. R. CIV. P. 19 ruling. *See Perrian v. O'Grady*, 958 F.2d 192, 196 (7th Cir. 1992) (refusing to decide whether *de novo* or abuse of discretion is the appropriate standard). We need not decide this question today for even under a *de novo* review, we believe the district court properly denied the plaintiffs' joinder motion. Federal Rule of Civil Procedure 19 requires the court to determine whether a party is indispensable. *Provident Tradesman Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118-19, 88 S. Ct. 733, 742-43 (1968). "The test for an indispensable party is whether justice cannot be done unless it is joined." *Spartech Corp. v. Opper*, 890 F.2d 949, 954 (7th Cir. 1989). The plaintiffs' motion for joinder fails to explain how Wade Trucking is an indispensable party. The motion merely states in a conclusory manner that "joinder of the proposed plaintiff is necessary in that as a practical matter the proposed plaintiff will be impaired or impeded in protecting its rights and claims, if joinder is not granted." Simply quoting Rule 19's language is inadequate. Moreover, we fail to see how joining Wade Trucking would affect this suit at all.

Presumably the plaintiffs moved to join the trucking company out of concern that they may lack standing to seek relief on Wade Trucking's behalf. However, joinder of Wade Trucking will not likely solve the standing problem. Since Wade Trucking is in bankruptcy, RICO actions, among other actions, are properly brought by the trustee,

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[4] The plaintiffs' contention that the district court refused leave primarily because the complaint violated FED. R. CIV. P. 12(f) is not supported by the record and does not merit discussion.

not by shareholders or the debtor corporation itself. *Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339, 1343 (7th Cir.), *cert. denied*, 485 U.S. 906, 108 S. Ct. 1077 (1988). Therefore, it appears that Wade Trucking's current successor trustee is the only one with standing to bring actions for Wade Trucking's alleged injuries. *In re San Juan Hotel Corp.*, 847 F.2d 931 (1st Cir. 1988) (successor trustee has standing to sue predecessor trustee); *McMerty v. Herzog*, 702 F.2d 127 (8th Cir. 1983) (suit by successor trustee against former trustee).[5]

Because the plaintiffs have failed to demonstrate that Wade Trucking is a indispensable party, we affirm the district court's denial of joinder.[6]

RICO Claim

The plaintiffs contend that the district court erred in dismissing their RICO claim against defendants Hopper and Merchants. The district court dismissed the plaintiffs' RICO count on alternate grounds: lack of standing and failure to allege a "pattern of racketeering." We review a FED. R. CIV. P. 12(b)(6) dismissal *de novo*. *Lolling v. Patterson*, 966 F.2d 230, 233 (7th Cir. 1992).

Given our earlier conclusions, the plaintiffs' second amended complaint governs our inquiry. In that complaint, George and Joyce Wade brought a RICO claim as individuals alleging that they "were injured in their business and their property." The district court properly concluded

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[5] This is particularly true since the Wades have not alleged that the corporation's successor trustee has refused to act on Wade Trucking's behalf. *See, e.g., In re Consolidated Bancshares, Inc.*, 785 F.2d 1249, 1254 (5th Cir. 1986).

[6] The plaintiffs also moved to join certain defendants, claiming "new evidence." The district court concluded that the plaintiffs' "new evidence" argument was meritless. We agree that the plaintiffs offered no justification for failing to join the proposed defendants earlier. The trial court did not err in denying joinder of these defendants.

that they were not the proper parties to bring an action for harm done to Wade Trucking. A suit to redress a corporation's RICO injuries can only be brought by the corporation or by the shareholders in a derivative suit. *Sears v. Likens*, 912 F.2d 889, 892 (7th Cir. 1990) ("RICO claim is a corporate asset, not an individual one"); *Rylewicz v. Beaton Services, Ltd.*, 888 F.2d 1175, 1179 (7th Cir. 1989) ("substantial" shareholder cannot maintain an action based on injury to the corporation). *See also Warren v. Manufacturers National Bank*, 759 F.2d 542, 544 (6th Cir. 1985) (sole shareholder cannot bring suit for corporate injury).[7] The injury of which the Wades complain belongs to Wade Trucking and the Wades are not suing on its behalf. In addition, the Wades' second amended complaint fails to describe how they were directly and personally injured by the alleged RICO violations.

We also note that the Wades' RICO claim fails because their complaint did not allege a "pattern of racketeering" as required by 18 U.S.C. § 1961. As a preliminary matter, we question whether the plaintiffs' complaint complies with FED. R. CIV. P. 9(b), which requires that fraud be pleaded with particularity. "This means that the complaint must state 'the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated.' " *Schiffels v. Kemper Financial Services, Inc.*, 978 F.2d 344, 352 (7th Cir. 1992) (quoting *Bankers Trust Co. v. Old Republic Ins. Co.*, 959 F.2d 677, 683 (7th Cir. 1992)). With occasional exceptions, the plaintiffs' allegations are either conclusory or vaguely supported as to times, places, and other important factual data. *See Jennings v. Emry*, 910 F.2d at 1438 ("bare legal conclusions unsupported by sufficient factual detail" inadequate to state RICO claim).

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[7] Moreover, as discussed above, since Wade Trucking is in bankruptcy, the RICO claim appears to belong to the trustee rather than to Wade Trucking.

Even assuming that the plaintiffs have met the requirements of FED. R. CIV. P. 9(b), they failed to allege a "pattern of racketeering" as required by the RICO statute. To establish the requisite pattern, the plaintiffs must allege facts which suggest " 'long-term criminal conduct', not [ ] short-lived episodes unlikely to be repeated." *Schiffels*, 978 F.2d at 353 (quoting *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 242, 109 S. Ct. 2893, 2902 (1989)). We must look at all the allegations to determine "whether the *threat* of continuity is demonstrated." *H.J., Inc.*, 492 U.S. at 242, 109 S. Ct. at 2902. We analyze four specific factors when determining whether a pattern exists:

> (1) the number and variety of predicate acts and the length of time over which they were committed; (2) the number of victims; (3) the presence of separate schemes; and (4) the occurrence of distinct injuries.

United States Textiles, Inc. v. Anheuser-Busch Companies, 911 F.2d 1261, 1266 (7th Cir. 1990). *See also Hartz v. Friedman*, 919 F.2d 469 (7th Cir. 1990) (plaintiff's complaint fails to allege a pattern in light of the four-factor analysis).

Keeping in mind our goal of a common sense result, an examination of the Wades' second amended complaint reveals that the plaintiffs have failed to allege the requisite "pattern" under the four-factor analysis. At best, the plaintiffs have alleged a single scheme directed at a single victim and resulting in a single injury. While the absence of multiple schemes or victims is not dispositive, it is instructive. *United States Textiles*, 911 F.2d at 1269. Moreover, almost all of the predicate acts the plaintiffs allege are similar, involving essentially bankruptcy fraud, and occurred in a period of less than a year. *See id.*; *Hartz*, 919 F.2d at 473. Therefore, we hold that the plaintiffs have failed to allege facts which suggest "the existence of a genuine threat of continued criminal activity." *Redstart*, 935 F.2d at 821.

Bivens Claim

Plaintiffs believe the district court erred in dismissing their constitutional tort claims against Hopper. The plaintiffs allege that Hopper's behavior provided the basis for a *Bivens* action since the defendant "improperly and illegally used the shield of the United States Bankruptcy Court" to violate the plaintiffs' constitutional rights. According to the plaintiffs, four events violated their First, Fourth and Fifth Amendment rights: (1) Hopper redirected and concealed the Wades' mail; (2) Hopper appropriated approximately $300 of the Wades' money; (3) Hopper, as bankruptcy trustee, "maliciously" filed to deny Wade Trucking's bankruptcy discharge; and (4) Hopper unreasonably searched the Wades' home.

The district court concluded that only the last event sufficiently stated a *Bivens* claim and dismissed the others. Our review is *de novo*, *Lolling*, 966 F.2d at 233, and we affirm the district court's disposition of the first three claims. The plaintiffs made no intelligible legal arguments demonstrating how these incidents rose to the level of constitutional torts compensable under *Bivens*; the only legal authorities cited by the plaintiffs were irrelevant. The district court properly concluded that only the unreasonable search claim was viable.

Even though it held that an unreasonable search by Hopper could provide the basis for an actionable *Bivens* claim, the district court subsequently granted summary judgment for Hopper. Needless to say, the plaintiffs believe the district court made another error in holding that their claim was barred by the principle of res judicata. We review a grant of summary judgment *de novo*. *Rizzo v. Caterpillar*, 914 F.2d 1003, 1006 (7th Cir. 1990). We will affirm summary judgment if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Id.*

The complaint alleged that Hopper directed Jack Fife and his wife to search the Wades' home without a warrant or notice, for the sole purpose of harassing the Wades. This

incident was the subject of previous litigation. *Wade v. Fife*, No. IP88-1422-C. *Wade v. Fife* was an adversary proceeding filed August 1, 1988 [hereinafter the "adversary proceeding"]. Therefore, the question is whether there was a final judgment on the merits in the adversary proceeding which precludes the plaintiffs from relitigating issues that were or could have been litigated in that action. *Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 414 (1980).

As an initial matter, the plaintiffs argue that the district court did not have jurisdiction to render a final judgment in the adversary proceeding for two reasons: (1) the district court was sitting as a bankruptcy court, not as a district court, and (2) the plaintiffs did not intend to submit their *Bivens* claim regarding the search to the district court in that proceeding. A single principle defeats both arguments. A party cannot challenge a court's jurisdiction in a collateral proceeding after failing to appeal the initial decision. *Lambert v. Conrad*, 536 F.2d 1183, 1185 (7th Cir. 1976). *See also Disher v. Information Resources, Inc.*, 873 F.2d 136, 140 (7th Cir. 1989). In the adversary proceeding, the district court concluded that it had complete authority and jurisdiction to hear the *Bivens* claim and that decision was never appealed. Consequently, we reject the plaintiffs' jurisdictional challenge and examine only whether the elements of claim preclusion are present in this case.

To apply res judicata, three essential elements must exist:

> (1) a final judgment on the merits in an earlier action; (2) an identity of the cause of action in both the earlier and later suit; and (3) an identity of parties or privies in the two suits.

Smith v. City of Chicago, 820 F.2d 916, 917 (7th Cir. 1987). It is undisputed that the Wades and Hopper were both named parties in the adversary proceeding. The adversary proceeding was dismissed pursuant to FED. R. CIV. P. 12(b)(6), which constitutes a final adjudication on the merits. *Cannon v. Loyola University of Chicago*, 784

F.2d 777, 780 (7th Cir. 1986), *cert. denied*, 479 U.S. 1033, 107 S. Ct. 880 (1987). Finally, the two cases involve the same cause of action. The Wades' claim in both suits was based on the same set of operative facts and even based on the same legal theory—the *Bivens* claim. *Crop-Maker Soil Services v. Fairmont State Bank*, 881 F.2d 436, 438 (7th Cir. 1989) (standard met if claims arise from the same incident or have identical theories of recovery).

Since the Wades had the opportunity to litigate the issue of the alleged unreasonable search in the earlier adversary proceeding, the district court properly granted Hopper's motion for summary judgment.

Attorney Malpractice

The district court dismissed the plaintiffs' attorney malpractice claims against Hostetler & Kowalik and Hopper & Opperman for failure to state a claim. The Wades believe this was an error. We do not agree. As noted above, we review the dismissal *de novo*. *Lolling*, 966 F.2d at 233.

According to the Indiana Supreme Court:

> [a]bsent fraud, collusion, malicious or tortious conduct on the part of an attorney, the rule is [ ] well established that no liability to third parties arises from the attorney's conduct as an attorney for another.

Meier v. Pearlman, 401 N.E.2d 31, 40 (Ind. 1980). The plaintiffs claim that *Meier* is no longer good law, citing *Walker v. Lawson*, 526 N.E.2d 968 (Ind. 1988), and *Herman v. Frey*, 537 N.E.2d 529 (Ind. App. 1989). In *Walker*, the court held that a non-client beneficiary under a will has an action against the attorney-drafter since the beneficiary is a known third party. 526 N.E.2d at 968. The court seems to have created an exception; however, it did not even mention, much less overrule, *Meier*. *Herman* also involved a non-client beneficiary who was permitted to sue an attorney who drafted a will. *Herman*, however, was an Court of Appeals decision which has no effect on the validity of *Meier*. Because we will not expand exceptions propounded by the Indiana Supreme Court, we conclude that the rule articulated in *Meier* governs these facts.

The plaintiffs did not allege the existence of an attorney-client relationship with these defendants, attorneys hired by the bankruptcy trustee. Neither did the Wades allege fraud, collusion, or malicious conduct in their complaint. Thus, the district court properly dismissed their attorney malpractice claims under FED. R. CIV. P. 12(b)(6).[8]

Miscellaneous Challenges

The Wades contend that they were prejudiced by various district court discovery rulings. Their arguments are entirely without merit. The plaintiffs fail to cite any authority or make any cogent arguments to demonstrate that the district court abused its discretion, thus we hold that it did not. *See Indianapolis Colts v. Baltimore*, 775 F.2d 177, 183 (7th Cir. 1985) (trial courts have broad discretion over discovery process).

Plaintiffs' argument that the district court made findings unsupported by the evidence is without merit and does not require discussion. Similarly, the Wades' contention that the district court abused its discretion by denying their motion to disqualify the judge is meritless.

Based on the foregoing analysis, the disposition of the district court is AFFIRMED in its entirety.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[8] Moreover, we note that even if allegations of negligence were sufficient to state a claim, the Wades do not have standing to bring the suit. Similar to the RICO discussion above, any harm by attorney malpractice damaged Wade Trucking, not the plaintiffs. Hence, the action belongs to Wade Trucking or, more properly, the bankruptcy trustee.

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

April 22, 1993

GEORGE WADE and JOYCE WADE, Plaintiffs-Appellants	) Appeal from the United States District Court for the Southern District of Indiana Indianapolis Division.
No. 91-3892 vs.	) No. 88 C 65
Edward B. Hopper, II, et al., Defendants-Appellees.	) Larry J. McKinney, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc, no judge in active service has requested a vote thereon, and all judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing en banc be, and the same is hereby, DENIED.

Furthermore, plaintiffs-appellants attorney Mark Garringer may be subject to the imposition of sanctions under Fed.R.App.P. 46(c).

In our February 17th order, we held that the plaintiffs' second amended complaint governed this dispute and out analysis. Mr. Garringer's petition for rehearing virtually ignores this and repeatedly refers us to the plaintiffs' third amended complaint. This conduct appears to amount to a material misrepresentation.

In addition, the petition filed by Mr. Garringer is full of disrespectful language directed to the Court. The following is an example:

> The Circuit Court states that it read the proposed complaint. However the problem must be [sic] reading comprehension skills of the Circuit Court. When the proposed complaint states...the Circuit Court must not have the reading skills and the capacity to understand basic English and the plain meaning of the Laws of the United States.

Mr. Garringer is ordered to SHOW CAUSE why sanctions should not be imposed

pursuant to Rule 46(c) for the foregoing behavior. The response of Mr. Garringer must be filed no later than May 6, 1993.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GEORGE and JOYCE WADE Plaintiffs,	)	
v.	)	CAUSE NO. IP88-65-C
GORDON SMITH, HUME, SMITH, GEDDES & GREEN, EDWARD B. HOPPER, II, HOPPER & OPPERMAN, OPPERMAN & HOSTETLER, and HOSTETLER & KOWALIK, Defendants.	)	

ENTRY AND ORDER

This Court has delayed issuing an Order in this cause until the related bankruptcy and Freedom of Information Act "FOIA") cases reached their respective conclusions. On February 4, 1991, the Seventh Circuit Court of Appeals dismissed the appeal in the Wades' bankruptcy case (IP 88-1417-C),[1] and today this Court

[1]The record reflects the debtors have filed writ of certiorari to the United States Supreme Court.

has issued an Order ruling on the remaining motions in that case. Similarly, the Court also has issued separate Orders today in the Wades' two FOIA cases (IP 89-771-C and IP 89-1118-C) bringing these actions to a close.

Accordingly, this octopus-like proceeding has been reduced to a single dispute. Unfortunately, delaying action on this case has allowed numerous motions to accumulate. This Order addresses these motions. A brief procedural background is set forth to assist in the resolution of these motions.

I. Procedural Background

On January 20, 1988, plaintiffs George and Joyce Wade filed a complaint asserting three causes of action: (1) a civil rights claim pursuant to 42 U.S.C. §1983; (2) a federal Racketeer Influenced and Corrupt Organizations Act ("RICO") claim pursuant to 18 U.S.C. §1961 et seq.; and (3) a

state law attorney malpractice claim. After the defendants moved to dismiss this complaint, the plaintiffs on May 2, 1988, filed a motion for leave to file an amended complaint. At a May 5, 1988, pretrial conference, the Court allowed the amended complaint to be filed, thus mooting the motions to dismiss.

Thereafter, on September 1, 1988, the plaintiffs filed a motion to join Merchants Bank and Trust Co. ("Merchants") as a defendant. The Court granted this motion September 1, 1988, and on September 6, 1988, the plaintiffs filed a "Second Verified Amended Complaint." ("second amended complaint").

The second amended complaint also asserts three causes of action. Count One is directed at defendants Edward B. Hopper, II and Gordon Smith and presents a constitutional tort claim pursuant to Bivens v. Six Named Unknown Agents, 403 U.S. 388 (1971). Count Two asserts the

plaintiffs' RICO claim against Hopper, Smith, and Merchants. Count Three alleges attorney malpractice claims against all defendants except Hopper and Merchants.

Each of the defendants has filed motions to dismiss. Hopper filed a motion to dismiss on August 29, 1988.[2] Smith and Hume, Smith, Geddes & Green ("Hume-Smith"), filed a motion to dismiss this complaint September 27, 1988. Merchants filed a motion to dismiss October 28, 1988.[3] Defendants Hostetler & Kowalik filed a motion to dismiss this complaint on December 2, 1988, and defendants Hopper & Opperman filed a similar motion December 12, 1988.

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[2]This motion to dismiss actually was directed at the first amended complaint. However, for the purposes of the motion to dismiss, the allegations against Hopper are the same in both complaints.

[3]Merchants filed a second motion to dismiss April 12, 1989, in connection with an April 6, 1989, pleading filed by plaintiffs.

On December 6, 1988, the plaintiffs again filed a motion for leave to amend, seeking to add Robert L. Sheaffer as a defendant in the RICO count. The plaintiffs also filed a motion requesting the joinder of U.G. Wade Trucking, Inc., ("Wade Trucking"), Charles Kilby, and Timothy J. Woods. These motions still pend.

On December 13, 1988, the plaintiffs filed a "Motion to Amend and Enter Into the Pleadings the Plaintiffs' Third Verified Amended Complaint." On December 16, 1988, this Court stayed this proceeding, and the motion to amend has not yet been decided.[4] On October 12, 1989, the plaintiffs filed another motion for leave to amend, citing new-found evidence in support of their RICO claim and asking for "one last chance at bat." The defendants objected to these attempts

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[4]On January 10, 1989, thr the Court issued a modification of the stay order. To the extent the stay Order remains in effect today, the Order is vacated.

to amend the complaint, noting the complaint already had been amended and dispositive motions were again pending.

Pursuant to an Entry of October 23, 1989, the Court Ordered the plaintiffs to file a proposed amended complaint, and provided that the defendants could file objections thereto, whereafter the Court would "rule on whether the proposed amended complaint should be allowed." (Order of October 23, 1989, at 2).

II. DISCUSSION

The Court first must determine which complaint will govern this action. With this issue decided, the Court can turn its attention to the pending dispositive motions, as well as several other miscellaneous motions.

A. Leave to Amend/Joinder

As the record now stands, this action is governed by the second amended complaint filed on September 6, 1988. Based on this Court's Order of October 23,

1989, the question is whether this complaint should continue to govern, or whether this cause should instead proceed based upon the plaintiffs' proposed amended complaint of November 6, 1989 ("proposed complaint").

The proposed complaint spans 52 pages. Thus, it fails to comply with Fed.R.Civ.P. 8(a)'s requirement that a pleading setting forth a claim for relief shall contain "a short and plain statement of the claim..." (emphasis added). The proposed complaint is neither short nor plain.[5]

A complaint which fails to comply with rule 8 is subject to dismissal. Crumpacker v. Civiletti, 90 F.R.D. 326, 330 (N.D.Ind. 1981). As Judge Aspen noted in Crumpacker, and intricate theory might warrant a more detailed explication. Certainly a RICO case fits this bill. But

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[5]The proposed complaint also incorporates by reference a 700-page report from the Federal Bureau of Investigations. (Proposed Complaint at 8).

here, as in Crumpacker, the proposed complaint "does not by any stretch of the imagination provide a clear and brief statement of plaintiffs' action; to the contrary, it embodies virtually every conceivable element of poor pleading." Id. at 329.

The proposed complaint accuses the defendants of fraud, perjury, making false claims, concealment of assets and documents from the bankruptcy estate, breach of fiduciary duty, conspiracy, and mail tampering, to list just a few. As such, the complaint goes well beyond a short, plain statement of the claim and instead is riddled with ad hominem attacks, and therefore is subject to being stricken pursuant to Rule 12 (f). That the plaintiffs' complaint would contain unacceptable, scandalous matter is not surprising, however, given that the plaintiffs previously have engaged in the same behavior. (See Order of April 11,

1990, in related cause IP 89-771-C, citing United States v. Kimberlin, 898 F.2d. 1262 (7th Cir.), cert. denied, 111 S.Ct. 434 (1990).

Lack of compliance with Rules 8(a) and 12(f) are not the only factors weighing against allowing the proposed complaint to guide this litigation. Twice the plaintiffs have been granted leave to amend. Leave was granted despite the fact that the defendants had filed motions to dismiss the complaint and briefed the issues. Once again the plaintiffs seek leave to amend after the defendants have filed and briefed motions to dismiss. These motions now pend and the time for resolving these motions is long past due. Allowing the complaint to be amended would again moot the motions to dismiss and thus squander judicial and adversarial efforts.

Pursuant to this Court's Entry of October 23, 1989, the plaintiffs nevertheless were given the opportunity to

file a proposed amended complaint and thus demonstrate that leave to amend should be granted. However, a review of the proposed complaint (as well as plaintiffs' "Third Verified Amended Complaint") leaves the Court firmly convinced that the plaintiffs remain unsure as to how to properly plead a cause of action for the wrongs the allegedly suffered. Providing yet another opportunity to amend will not cure this problem.

On balance, the Court finds that justice would be compromised rather than advanced by granting the plaintiffs leave to file another complaint. Accordingly, the plaintiffs' motion for leave to amend is denied, and the plaintiffs' second amended complaint, filed September 6, 19888, will govern the issues in this cause.

Contemporaneously with the filing of the proposed complaint, the plaintiffs moved to join Wade Trucking as a party

plaintiff. As discussed infra, a likely motivation for this motion was concern regarding the plaintiffs' standing to sue individually for some of the relief sought on behalf of Wade Trucking. The motion states "joinder of the proposed plaintiff is necessary in that as a practical matter the proposed plaintiff will be impaired or impeded in protecting its rights and claims, if joinder is not granted." (Plfs. Motion for Joinder at 3).

As defendant Merchants notes in its brief opposing joinder, the plaintiffs "have made no allegations regarding the 'indispensibility' of U.G. Wade Trucking, Inc., or any other assertions" that would make Rule 19(a) applicable, and a "mere assertion that joinder is necessary with nothing further is inadequate." (Merchants' Objection to Joinder at 7). Merchants' observation is correct. Accordingly, the motion for joinder is denied to the extent it seek to join Wade Trucking as a plaintiff.

The motion for joinder also seeks to add Charles Kilby and Timothy J. Woods as defendants in the RICO claim. On a related matter, a motion now pends seeking to add Robert L. Sheaffer as a RICO defendant. For many the same reasons previously advanced, the Court finds these motions should be denied. The plaintiffs offer no justifiable reason for not naming these individuals as defendants from the outset. The plaintiffs' reference to "new found" evidence is meritless. Rule 15 is not a license for carelessness or gamesmanship. Fort Howard Paper Co. v. Standard Havens, Inc., 901 F.2d. 1373, 1379 (7th Cir. 1990). Accordingly, these motions are denied.

The Court must next address the numerous potentially dispositive motions now pending. Each of the defendants has filed a motion to dismiss. In addition, on November 1, 1988, the plaintiffs filed a "Motion for Declaratory Judgment and

Motion for Summary Judgment" against defendants Merchants, and on November 29, 1988, filed a motion for summary judgment against defendants Smith and Hume-Smith.

B. Count One: Bivens Claim

Count One of the complaint seeks damages from Hopper, the former bankruptcy trustee, and Smith, the plaintiffs' former attorney, on grounds that these defendants "improperly and illegally used the shield of the United States Bankruptcy Court" to violate the plaintiffs' various constitutional rights. (Plfs.' Second Amended Complaint at 11). This claim is asserted pursuant to Bivens v. Six Named Unknown Agents, 403 U.S. 388 (1971). The plaintiff alleges numerous Bivens violations, each of which will be addressed individually, in the order and form in which they appear in the complaint.

1. Fourth and Fifth Amendments: theft of Wade Trucking assets

The plaintiffs allege the following violations:

> The right of the Plaintiffs to be secure against seizure, as afforded by the Fourth Amendment, and the right of the Plaintiffs to be secure from the deprivation of property, as afforded by the fifth Amendment, from the theft and failure to preserve Trucking Company assets by Defendants.

(Plfs.' Second Amended Complaint at 11, ¶2(a)).

The defendants argue that because the allegations involve the alleged "theft and failure to preserve Trucking Company assets by Defendants," the plaintiffs are seeking redress for injuries allegedly suffered by Wade Trucking, and therefore the plaintiffs lack standing.

The Court, having previously herein denied the plaintiffs' motion for joinder, finds the plaintiffs lack standing to bring an action in their individual capacity to recover damages on behalf of

Wade Trucking. Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982). Even if this Court had allowed joinder, Wade Trucking arguably would have been without standing for the plaintiffs did not allege that the assets of the estate exceed the liabilities. See Kapp v. Naturalle, Inc., 611 F.2d. 703, 706-07 (8th Cir. 1979).

Accordingly, the plaintiffs' Fourth and Fifth Amendment claims, as set forth in Count One, ¶2(a) of the Second Amended Complaint, are dismissed with prejudice.

2. Thirteenth and Sixteenth Amendments: involuntary servitude/taxes

The plaintiffs allege the following Thirteenth and Sixteenth Amendment violations:

> The right of Plaintiffs to be free of taxation in excess of income, as afforded by the delineation of powers in the Sixteenth Amendment, and the right of Plaintiffs to be free from involuntary servitude, as defined by the Thirteenth Amendment, from the fraudulent transfers of reported taxable activity of Plaintiffs and their Trucking Company with full knowledge, authority and acquiescence of Defendants.

(Second Amended Complaint at 11, ¶2(b)).

The plaintiffs concede that the Thirteenth Amendment's prohibition on involuntary servitude involves cases in which one individual exercises control over another so that the latter is coerced into laboring for the former. See United States v. Mussry, 725 F.2d. 1448, 1452 (9th Cir.), cert. denied 469 U.S. 855 (1984). However, the plaintiffs argue that the cause of action the pursue falls within the "penumbras and emanations" that extend from the Constitution. The Court, however, finds no authority for the allegations in the plaintiffs' complaint fall within any Thirteenth Amendment emanation, and therefore the plaintiffs' claim under the Thirteenth Amendment is dismissed with prejudice.

The plaintiffs' assert in their Sixteenth Amendment claim that they were "being assessed improper tax delinquencies as a direct result of theft of trucking

company assets and fraudulent tax assessments." The Court notes the plaintiffs have failed to cite to a single case in which a Bivens plaintiff was permitted to proceed for this type of alleged Sixteenth Amendment violation. The Court finds this deficiency telling. Accordingly, the plaintiffs' claim under the Sixteenth Amendment is dismissed with prejudice.

3. Fourth Amendment: papers and effect

The plaintiffs allege the following Fourth Amendment violations:

> The right of the Plaintiffs to be secure against seizure, as afforded by the Fourth Amendment, and the right of the Plaintiffs to be secure from the deprivation of property, as afforded b the fifth Amendment, from the theft and failure to preserve Trucking Company assets.

(Plfs.' Second Amended Complaint at 11, ¶2(c)).

The allegation refer only to Smith, and therefore on its face is subject to dismiss as to Hopper. Moreover, the

plaintiffs ask this Court to find a Fourth Amendment violation for an attorney's failure to affix the proper mailing address on the plaintiffs' bankruptcy petition. Again, this request is made without citation to authority, and again, this Court finds it without merit. Accordingly, the plaintiffs' Fourth Amendment claims, as set forth in Count One, ¶2(c), are dismissed with prejudice.

4. First, Fifth and Sixth Amendments: grievances/infamous crimes

The plaintiffs allege the following Fifth and Sixth Amendment violations:

> The right of Plaintiffs not to have to answer for infamous crimes except as provided by the Fifth and Sixth Amendment, and for restraint of expression to petition the Government for redress of grievances of the First Amendment by prosecution of the malicious adversary complaint in the bankruptcy proceedings by [Hopper].

(Plfs.' Second Amendment Complaint at 12, ¶2(d)).

It appears the plaintiffs' First Amendment claim is based upon the allegation that the Wades "had some

grievances about what was going on in their bankruptcy," and Hopper accused the Wades of fraud "in a scheme to coerce and intimidate the Wades into keeping their mouths shut." (Plfs.' response Brief at 6).[6] These allegations are insufficient to state a First Amendment claim for relief, and thus this claim is dismissed with prejudice.

Similarly, the plaintiffs' Fifth and Sixth Amendment claims must fail. The Sixth Amendment is not implicated in any fashion. As for the Fifth Amendment, the "infamous crimes" for which the Plaintiffs have been held to answer is a mystery. The plaintiffs' response briefs mentions "bankruptcy fraud," apparently in reference to the fact that Hopper initiated an adversary complaint to deny

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[6]Due to the odd and vague nature of the plaintiffs' claims, it is useful to use the plaintiffs' brief in opposition to the motion to dismiss as an interpretive guidepost.

discharge to the plaintiffs. However, this allegation does not trigger the Fifth Amendment. Accordingly, the plaintiffs' Fifth and Sixth Amendment claims, as set forth in Count One, ¶2(d), are dismissed with prejudice.

5. Fourth Amendment: unreasonable search of home

The plaintiffs allege the following Fourth Amendment violations:

> The right of Plaintiffs to be secure in their home against unreasonable search as afforded by the Fourth Amendment, in the search of Plaintiffs home by Jack Fife and his wife under the authority and direction of Edward B. Hopper, II, without notice to the United States Bankruptcy Court.

(Plfs.' Second Amended Complaint at 12, ¶2(e).

Hopper argues that in bankruptcy cases, a bankrupt cannot reasonably expect to be free from intrusions by the trustee, who is entitled to possession of the bankrupt's property. See United States v. Masterson, 383 F.2d. 610, 613 (2d Cir. 1967), cert. denied, 390 U.S. 954 (1968).

This is a correct general statement of the law. However, even if Hopper admits that a constitutional violation could lie if the defendants' conduct was sufficiently outrageous, such as if the defendants injured or abused the plaintiffs. Thus, the question now before the Court is whether the plaintiffs have alleged such an unreasonable search by the defendant so as to be actionable.

The only allegation against Hopper involving claims of an unreasonable search is found at page 10, paragraph 35, of the complaint, which states:

> [O]n August 8, 1986, Jack Fife and his wife, on directions of Edward B. Hopper II, searched the home of the plaintiffs without warrant or notice to the United States Bankruptcy Court. Said search was conducted through Joyce Wade's underwear, the refrigerator, and the household chemicals under the kitchen sink. The sole purpose of this search was to harass and intimidate the plaintiffs

Taking this allegation as true, as the Court must for the purpose of motion to dismiss, Gomez v. Illinois State Board of Education, 811 F.2d. 1030, 1039 (7th Cir

1987), the Court finds the plaintiffs have stated a claim against Hopper. A bankrupt does not relinquish all Fourth Amendment protections upon the filing of a bankruptcy petition. Accordingly, the Court denies Hopper's motion to dismiss the plaintiffs' Fourth Amendment claim, as set forth in Count One, ¶2(e), of the second amended complaint. However, to the extent plaintiffs are attempting to assert a Fourth Amendment claim against Smith, this claim is dismissed, for the plaintiffs have made no allegations associating Smith with the alleged unlawful conduct.

6. Fourth Amendment: seizure of property

The plaintiffs allege the following additional Fourth Amendment violations:

> The right of Plaintiff, George Wade to be secure from the seizure of property as afforded b the Fourth Amendment, in the seizure of the $81.66 post-petition Veterans Administration benefit of George Wade by Edward B. Hopper II from the Farmers National Bank without notice to the bankruptcy court.

(Plfs.' Second Amended Complaint at 12, ¶2(f).

As to this claim Hopper asserts "the Wades should have expected Hopper to exercise dominion over checks in their names coming into Hopper's possession...." (Def.'s Motion to Dismiss at 10). Hopper further argues that the plaintiffs' allegation that Hopper misappropriated $81.66 is a claim for conversion, not a constitutional tort under the Fourth Amendment. The Court agrees. Not every wrong rises to the level of a constitutional violation. See e.g., Kenny v. Block, 884 F.2d. 579 (6th Cir. 1989) (table) (noting Bivens remedy exists only for violations of constitutional rights, and thus not all government misconduct rises to the level of a constitutional tort). Accordingly, the plaintiffs' Fourth Amendment claim, as set forth in Count One, ¶2(f), of the second amended complaint, is dismissed with prejudice.

C. Count Two: RICO Claim

Count Two of the complaint contains the

plaintiffs " RICO allegations against Hopper, Smith, and Merchants. Each defendant has filed a motion to dismiss in response. Theses motions will be decided jointly because two dispositive issues are common among them. These issues are: (1) whether the plaintiffs lack standing to bring a RICO claim for injuries allegedly suffered by Wade Trucking; and (2) even if plaintiffs have standing, whether the plaintiffs have failed to adequately allege a "pattern of racketeering activity."

RICO provides a private civil action to recover treble damages for injury to business or property by reason of a violation of its substantive provisions. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 481-83 (1985); 18 U.S.C. §1964(c). To state a RICO claim, a plaintiff must allege four elements: (1) conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity. Sedima at 496.

In this case, the plaintiffs allege injury to their business and property based on a far-reaching scheme involving, in part, fraudulent transfers of assets, embezzlement of bankruptcy estate property, concealment of records, money laundering, and filing false proofs of claims with the bankruptcy court.

In regard to the first issue outlines above, the Court finds that the RICO count must be dismissed because the plaintiffs lack standing to bring this action for injuries allegedly suffered b Wade Trucking. A RICO suit can only be brought b the corporation itself or its shareholders suing derivatively on behalf of the corporation. Wooten v. Loshbough, 738 F.Supp. 314, 317 (N.D.Ind. 1990); Roefer v. Alpha Industries, Inc., 814 F.2d. 22, 30 (1st Cir.1987); Warren v. Manufacturers National Bank of Detroit, 759 F.2d. 542, 544 (6th Cir. 1985).

The plaintiffs contend Warren is

"questionable law" in this circuit in light of Haroco v. American National Bank & Trust Co., 747 F.2d. 384 (7th Cir. 1984), aff'd., 473 U.S. 606 (1985). Though Haroco discusses what injuries a plaintiff must plead and prove to prevail in a RICO action, the case makes no mention of whether an individual ma bring a RICO case based on corporate injury. In fact, Warren specifically notes this distinction. Id. at 545. The plaintiffs' failure to recognize this distinction undermines their position. Accordingly, dismissal of Count Two is warranted based on plaintiffs' lack of standing to assert a RICO claim for injuries allegedly inflicted on Wade Trucking.

In regard to the second issue outlined above, the Court finds that the RICO count also must be dismissed because the plaintiffs have failed to adequately allege a "pattern of racketeering activity." A pattern of racketeering

activity "requires at least two acts of racketeering activity." Sedima, 473 U.S. at 496 n.14. The defendants argue that at the very most "the Wades have alleged a single scheme to defraud a single victim, U.G. Wade Trucking, causing a single injury, the depletion of U.G. Wade Trucking assets." (Hopper's Brief in Supp. at 17).

In resolving this issue the Court finds it helpful to reference the Seventh Circuit's decisions in Morgan v. Bank of Waukegan, 804 F.2d. 970 (7th Cir. 1986), and Marks v. Pannell Kerr Forster, 811 F.2d. 1108 (7th Cir. 1987). These decisions discuss the meaning and scope of the RICO "pattern of racketeering activity" language found in §1962. In Morgan, the Seventh Circuit stated":

> In order to be sufficiently continuous to constitute a pattern of racketeering activity, the predicate acts must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions, i.e. transactions somewhat separated in time and place. Relevant factors include the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries.

Morgan, 804 F.2d. at 975. (quotations and citations omitted).

In the instant case, the plaintiffs have alleged only that the predicate acts were directed at a single victim, Wade Trucking, as part of a single scheme to saddle the plaintiffs with substantial non-dischargeable tax liabilities on income the plaintiffs did not receive. RICO requires "separate and distinct transactions in time and place," Marks, 811 F.2d. at 1112, yet the acts of which the plaintiffs complain were targeted at the same goal -- the downfall of the plaintiffs through manipulation of bankruptcy proceedings. Moreover, the length and time within which these acts could be committed were constrained by the plaintiffs' bankruptcy case, which is now concluded.

Given these facts, the Court must find that the plaintiffs have failed to

adequately allege a pattern of racketeering activity. Accordingly, the Court grants the motion to dismiss Count Two of the plaintiffs' complaint.[7]

D. Attorney Malpractice

Count Three alleges attorney malpractice claims against all defendants except Hopper and Merchants, namely, Hostetler & Kowalik, Hopper & Opperman, Smith and Hume-Smith. Hostetler & Kowalik and Hopper & Opperman have moved to dismiss Count Three against them. Smith and Hume-Smith have not.

The complaint alleges defendants Hopper & Opperman and Hostetler & Kowalik are law firms retained by Hopper in his capacity as bankruptcy trustee. The complaint further alleges that these firms "breached duties to Plaintiffs charged to them by

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[7]Moreover, defendants Smith and Hume-Smith correctly note that the plaintiffs' RICO allegations are insufficient as to them as a matter of law. The only RICO allegation as to these defendants is that they "failed to act when the were duty bound to do so." (Plfs.' Response at

the Rules of Professional Conduct and Title 11 of the U.S. Code, by virtue of their employment and practice of law in this matter." (Plfs.s Second Amended Complaint at 10;18).

The complaint does not allege these defendant forms and the plaintiffs, nor does it allege any specific acts allegedly conducted by these defendant firms. Therefore, these defendants seek dismissal of the complaint against them alleging "no cognizable claim can arise regardless of [their] conduct." (Hostetler & Kowalik's Motion to Dismiss at 2).

The Court finds the defendants' characterization of the law on this point incorrect. In Meier v. Perlman, 401 N.E.2d. 31, 41 (Ind.App. 1980), cert. denied, 449 U.S. 1128 (1981), the court

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12). Two additional reasons support the dismissal of Count Two as to these defendants. First, the failure to act alleged by the plaintiffs is not one of the specifically enumerated predicate acts under §1961(1) of RICO. Second, a single act as alleged by the plaintiffs is insufficient to constitute a "pattern of racketeering." Sedima, 473 U.S. at 496 n.14.

held that a non-client ma have a remedy against an attorney if there is some showing of fraud, collusion, malicious or tortious by the attorney toward the non-client. See also Miller v. Ortman, 136 N.E.2d. 17 (Ind. 1956) (holding nature of acts, not capacity, determines liability). Thus, to say conduct is irrelevant to the liability inquiry is unsupported b the law.

On the contrary, the conduct of the defendants is relevant. However, the second amended complaint lacks allegations sufficient to subject the firm defendants to liability. Accordingly, the motions to dismiss Hostetler & Kowalik and Hopper & Opperman are granted.[8]

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[8]The plaintiffs' April 6, 1989, response to Hostetler & Kowalik's motion to dismiss asks the Court to permit an amendment to Count Three of the complaint to add allegations sufficient to survive a motion to dismiss. (The plaintiffs did not seek to likewise amend the complaint against Hopper & Opperman.) The Court already has ruled, however, that the second amended complaint shall govern the issues in this cause. The plaintiffs'

D. Plaintiffs' Motions

The plaintiffs have filed three motions that must be addressed.

1. Default of Hostetler & Kowalik

The plaintiffs have moved for default judgment against defendant Hostetler & Kowalik. Having found that the motion to dismiss Hostetler & Kowalik should be granted, plaintiffs' motion for default judgment is moot.

2. Declaratory and summary judgment as to Merchants

The plaintiffs have moved for declaratory judgment against defendant Merchants. Having found that Count Two should be dismiss, plaintiffs' motion is moot, for only the Count Two asserts a cause of action against Merchants.

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combined response/motion to amend offers no persuasive reason why the requested amendment to Count Three should be allowed when the Court already disallowed amendment by the proposed complaint. In fact, plaintiffs' motion offers no explanation as to why the allegations the seek to add were not contained in either the original complaint or subsequent amendments. Accordingly, the plaintiffs' request to amend Count Three as to defendant Hostetler & Kowalik is denied.

moot, for only the Count Two asserts a cause of action against Merchants.

3. Summary judgment as to Smith and Hume-Smith

Count Three of the complaint alleges attorney malpractice against Smith and Hume-Smith, and the plaintiffs have moved for summary judgment as to these defendants. In filing this motion, the plaintiffs have failed to comply with Local Rule 9, requiring a separate supporting brief, and Local Rule 11, requiring a statements of material facts, proposed conclusions of law, and a proposed summary judgment. In addition, the plaintiffs have neither made nor even attempted to make any showing that there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law, as required under Fed.R.Civ.P. 56(c). Nor does the motion cite to the substantive law to be applied to a claim of attorney malpractice.

Instead, the plaintiffs' summary judgment motion is merely another in a long line of examples of the plaintiffs' attorneys' inability or unwillingness to following the rules of procedure. The filing of the plaintiffs' summary judgment motion ma well be sanctionable under Rule 11. However, sanction have not been requested, and the Court is disinclined to pursue the matter further at this juncture. However, the Court has previously held that it will entertain sanctions motions at the end of this proceeding, and several motions for sanctions against plaintiffs' counsel already pend. Thus, the issue may be revisited. In any event, the plaintiffs' motion for summary judgment is denied.

E. Miscellaneous Motions

Finally. the Court notes that a few "miscellaneous" motions still pend. However, in light of today's decision most of these motions are moot.

1. Objections to interrogatories

Smith objects to plaintiffs' third and fourth set of interrogatories, noting the come in the wake of some 55 previous interrogatories and numerous requests for admission. The Court finds the objections well taken, for Local Rule 14(c) requires leave of the Court to serve more than 30 interrogatories. However, the plaintiffs have not filed a motion to compel under Rule 37(a). Thus, at this time no action is required from the Court.

2. Plaintiffs Motion for Reconsideration

The plaintiffs ask this Court to reconsider its previous denial of the "Motion to compel Answers to Second and Third Set of Interrogatories from Edward B. Hopper, II." The Court being duly advised, denies the plaintiffs' motion for reconsideration.

III. CONCLUSION

In summary, the Court holds neither joinder of parties nor amendment of the

second amended complaint should be allowed, and therefore the second amended complaint shall frame the issues for litigation. Count One is dismissed except to the extent it asserts a Fourth Amendment claim against Hopper for the allegedly unreasonable search of the plaintiffs' home. Count Two is dismissed entirely. Count Three is dismissed as to all defendants except Smith and Hume-Smith. A scheduling Order shall hereafter issue so as to move this cause toward resolution.

IT IS SO ORDERED this 30 day of May, 1991.

LARRY J. McKINNEY
United States District Court
Southern District of Indiana